

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RONALD B. ENGELSMA,)	
)	
Petitioner)	
)	
v.)	Civil No. 01-181-B-S
)	Criminal No. 98-27-B-S
UNITED STATES OF AMERICA,)	
)	
)	
Respondent)	

RECOMMENDED DECISION

On September 7, 2001, Ronald Engelsma filed a motion to vacate judgment pursuant to 28 U.S.C. § 2255. The sole ground alleged is that his plea of guilty, entered on September 8, 1998, was not made voluntarily or with a full understanding of the nature of the charges and the consequences of a plea. I now recommend that the court summarily **DENY** the petition as time-barred.

Background

Engelsma was originally charged in a two-count indictment. Count I charged a violation of 18 U.S.C. § 922(g)(4) and § 924(a)(2), alleging that Engelsma possessed a firearm and was a prohibited person. Count II asserted a violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2) and alleged that Engelsma possessed a firearm and had a prior felony conviction. On September 8, 1998, Engelsma pleaded guilty to Count I and on December 30, 1998, he was sentenced to two months in prison followed by thirty-six months of supervised release and assessed \$100.00. (See Docket No. 8). At the time of

the presentence report Engelsma was identified as a naturalized United States citizen. (Pet'r Reply at 2-3.) Engelsma was sentenced and judgment entered on December 30, 1998. No appeal was taken from that judgment.

On December 11, 2000, a petition for revocation of Engelsma's supervised release was filed. His supervised release was revoked and Engelsma was sentenced to seven months in prison followed by twenty-four months of supervised release. Engelsma filed a timely appeal of that revocation. The Court of Appeals of the First Circuit issued its mandate dismissing the appeal on March 5, 2001. Engelsma then filed this motion on September 7, 2001, represented by the same counsel who handled his original case.

Apparently the Immigration and Naturalization Service ("INS") did not become aware of Engelsma's conviction while he was serving the initial period of imprisonment in 1998. Rather, they learned of the conviction when Engelsma was serving the imprisonment on the supervised release violation. At that point the INS commenced deportation proceedings. Engelsma remains in custody in an INS Detention Facility outside of Buffalo, New York. (See Bernstein Aff. at Docket No. 20, ¶¶ 7 –8).

Discussion

The initial question posed by this petition is whether Engelsma is challenging the voluntariness of the plea to the underlying firearms charge or the voluntariness of his plea to the revocation of supervised release. While the imprisonment on the supervised release may have "caused" INS to initiate deportation proceedings, it is the underlying conviction on the firearms charge that makes Engelsma deportable pursuant to 8 U.S.C. § 1227(a)(2)(C). In order for his petition to have any efficacy, it must be the underlying

judgment that he seeks to attack and I have therefore addressed that proceeding as the one under attack.

Section 2255 of Title 28 permits a person in federal custody to press for release on the grounds that his sentence was unlawful, unconstitutional, or otherwise subject to collateral attack. The fact that the period of imprisonment pursuant to this judgment has elapsed and that Engelsma's custody status pursuant to this judgment is supervised release is sufficient to qualify as being "in custody" pursuant to the judgment entered on December 30, 1998. See e.g. United States v. Brown, 117 F.3d 471, 475 (11th Cir. 1997).

However § 2255 does impose a deadline for the filing of a challenge to the underlying judgment. It provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;
- or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 6.

In this case the one-year limitation period began to run, under the most liberal construction of the deadline, in January 1999, at the expiration of the ten-day period allowed for appeal following the entry of the judgment on December 30, 1998. Fed. R. App. P. 4(b)(1); Fed. R. App. P. 26(a); see also Kapral v. United States, 166 F.3d 565, 577 –81 (3rd Cir. 1999)(Alito, J. concurring). Engelsma's petition was filed on

September 7, 2001, and the one-year limitation period expired in January 2000 and thus Engelsma's motion is time-barred unless one of the provisions in 28 U.S.C. § 2255 ¶6 (2) – (4) is applicable to this case. Subsections (2) and (3) are clearly inapplicable to Engelsma's claim.

Engelsma argues that subsection (4) is applicable because the facts supporting his claim could not have been discovered through the exercise of due diligence until the INS informed him that he was deportable prior to his release from imprisonment on the revocation sentence. That occurred in the spring 2001 and hence his petition filed September 7, 2001, is, he asserts, indeed timely. Engelsma seeks an evidentiary hearing at which he and his counsel will presumably present evidence that neither had any idea that his citizenship status would result in any collateral consequences at the time the plea was entered. I see no need for any such evidentiary hearing because even if the court accepts those facts as true they do not mean that the facts supporting this claim could not have been discovered through due diligence.

Both petitioner and the United States point out that often these claims regarding collateral consequences of a guilty plea occur in the context of a claim of ineffective assistance of counsel for failure to advise the defendant of the possibility of deportation. See. e.g., United States v. Gonzalez, 202 F.3d 20, 24-28 (1st Cir. 2000) (defendant unsuccessfully claiming ineffective assistance in the context of a motion to withdraw guilty plea prior to the imposition of sentence). In this case Engelsma does not voice any such claim, nor could he. Both his client and the presentence report (presumably in reliance upon information the officer received from Engelsma) informed counsel that Engelsma was a naturalized United States citizen. Engelsma had been in this country for

a great number of years and did not present any of the characteristics stereotypically associated with aliens. Counsel's failure to undertake an independent verification of Engelsma's citizenship status cannot be deemed ineffective in light of case law that holds that even in the most obvious of situations counsel's failure to advise a prisoner of possible deportation consequences is not ineffective assistance of counsel. See United States v. Quin, 836 F.2d 654, 655 (1st Cir. 1987) (in a challenge involving a waiver of a jury trial, noting that deportation "is generally regarded as a collateral consequence, only, viz., legally irrelevant, even as to an outright guilty plea").

Engelsma's claim is more subtle in that he argues that he could not have through the exercise of due diligence discovered that he was not a United States citizen until the INS instituted deportation proceedings. He suggests that because the presentence report mistakenly identified him as a naturalized United States citizen and because the INS failed to initiate deportation proceedings following his initial period of incarceration his failure to acknowledge his true citizenship status should not operate against him.

The 'fact' underlying this claim is Engelsma's citizenship status, not the legal consequence of that status. Engelsma's petition does not suggest any facts that would support a claim of due diligence with respect to his awareness of the true 'fact' of that underlying citizenship status. One can imagine a case where a petitioner alleges that his parents told him he had been naturalized and presented him with a phony document of naturalization, and then when notified by INS of his deportability, petitioner learns the true facts. Such allegations would at least support granting the evidentiary hearing that Engelsma seeks by this petition. However, he does not make any such claim and there is no reason to hold an evidentiary hearing to determine that no one knew the ultimate legal

consequences of Engelsma's plea of guilty. I accept that conclusion as true. It does not mean that with the exercise of due diligence Engelsma could not have learned that he was not an United States citizen prior to the entry of his guilty plea.

The bottom line is that one-year limitation period expired well prior to the initiation of this petition. Engelsma has not made a credible allegation that he could not have discovered that he was not an United States citizen through the exercise of due diligence prior to January 2000. His petition should be summarily denied.

Conclusion

Based upon the foregoing I now recommend that the court **DENY** the petition.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1993) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

November 26, 2001.

Margaret J. Kravchuk
U.S. Magistrate Judge

CJACNS CLOSED

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 98-CR-27-ALL

USA v. ENGELSMA

Filed: 07/08/98

Dkt# in other court: None

Case Assigned to: Judge GEORGE Z. SINGAL

RONALD B ENGELSMA (1) GREGG D. BERNSTEIN, ESQ.

defendant [term 12/30/98]

[term 12/30/98] [COR LD NTC cja]

LIPMAN & KATZ, P.O. BOX 1051

AUGUSTA, ME 04332-1051 207-622-3711

Pending Counts: Disposition

18:924A.F Person Previously Committed to Mental Institution in Possession of Firearm (1):

Dismissed upon Government Motion

18:924A.F Felon in Possession of Firearm (2): Imprisonment of 2 months; Self report date of
1/29/99 by 2:00 pm; Supervised release of 36 months; \$100 special assessment (2)

Offense Level (opening): 4

Terminated Counts: NONE

Complaints: NONE

U. S. Attorneys:

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